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No. 227

SUPREME COURT OF THE UNITED STATES

October Term, 1953

Dubby Flour Mills, Inc.,
Petitioner,

versus

Chicago, Rock Island and
Pacific Railroad Company,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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REPORTS OF OPINIONS OF COURTS BELOW

The opinion of the District Court is reported in 111 F.Supp. 496, and appears in the record at pages 16-29.

The opinion of the Court of Appeals, Tenth Circuit, reversing the District Court and sought to be reviewed here, is reported in 211 F.2d 785, and in the record at pages 73-78.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals sought to be reviewed was dated and filed on April 6, 1954 (R. 73-78).

The order of the Court of Appeals denying petitioner's petition for rehearing was dated and filed May 12, 1954 (R. 79).

Jurisdiction of this Court to review the judgment of the Court of Appeals by certiorari is invoked under 28 U.S.C., Section 1254(1).

The grounds on which the jurisdiction of this Court is invoked are as follows:

(1) The Court of Appeals has decided an important state question in conflict with applicable state law, statutory and case law.

(2) The questions presented are of substantial public importance in that every industry using railroad siding facilities will be affected, since there is involved the standard side-track indemnity agreement in general use throughout the country.

QUESTIONS PRESENTED

Under circumstances:

Where side-track agreement provides industry will indemnify railroad for all loss if railroad's employee is injured by sole negligence of industry and, if loss is caused by joint negligence of both parties, it is to be borne equally; and,

Where railroad compromises claim of its employee injured upon side-track on industry's premises after industry failed to reply to railroad's written notice to settle claim or railroad would, though no action had been filed by employee; and,

In this action by railroad against industry to recover the amount so paid to employee, the jury finds neither

the railroad under the F.E.L.A. nor the industry under common law was guilty of any negligence contributing to the injury, but that the railroad made the settlement in good faith and the damage sustained by the employee was the amount paid by the railroad.

(1) Is not a judgment for the industry compelled, as held by the trial court under Oklahoma statute providing an indemnity contract shall be construed as an agreement "to save another from a legal consequence of the conduct of one of the parties" and the person indemnified is entitled to recover "upon becoming liable," as construed by the Oklahoma Supreme Court in *M., K. & T. Ry. Co.* v. *Ellis,* 78 Okla. 150, 189 Pac. 363.

(2) Can the industry be obligated to pay indemnity where there is no "legal consequence" or "liability" arising by the conduct of either the industry or the railroad to the injured employee.

STATUTES INVOLVED

There are two sections of Oklahoma Statutes involved. The first is Oklahoma Statutes, Title 15, Section 421, reading:

> "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or of some other person."

The second is Oklahoma Statutes, Title 15, Section 427(1), reading:

> "Upon an indemnity against liability, expressly, or in other equivalent terms, the person indemnified is entitled to recover upon becoming liable."

STATEMENT OF THE CASE

This action was instituted by respondent railroad, an Illinois corporation, against petitioner, the industry, an Oklahoma corporation, to recover in excess of $3,000.00, exclusive of interest and costs, as indemnity claimed under a written side or spur track agreement, the pertinent portions of which read (R. 9):

> "The Industry also agrees to indemnify and hold harmless the Trustees for loss, damage or injury from any act or omission of the Industry, its employees or agents, to the person or property of the parties hereto and their employees and to the person or property of any other person or corporation, while on or about said track, and if any claim or liability other than from fire shall arise from the joint or concurring negligence of both parties hereto, it shall be borne by them equally."

The railroad wrote the industry that one of its brakemen, Fruit, had slipped and fell on the loading dock adjacent to the spur track, and was making claim for damages against the railroad under the F.E.L.A., for negligence in failing to furnish Fruit with a safe place to work, which place was claimed to have been in a hazardous condition due to the negligence of the industry. No response being made to such letter, the railroad compromised Fruit's claim without ever being sued, and brought this action to be indemnified under the above provision of the contract, asserting specific acts of negligence of the industry, for which the railroad said it was constructively liable.

The case was submitted to the jury on the following interrogatories, and gave these respective answers (R. 30-31):

"(1) Do you find that the plaintiff, Rock Island, was guilty of negligence in not providing Paul Fruit (employee) with a safe place in which to work, and that such negligence was a proximate cause of Paul Fruit's injury?

"Answer: No.

"(2) Do you find as a matter of fact that the defendant, Dobry Flour Mill, was negligent, and that such negligence was a proximate cause of Paul Fruit's injury?

"Answer: No.

"(3) Do you find that Paul Fruit was guilty of negligence and that such negligence was a proximate cause of his own injury?

"Answer: No.

"(4) Do you believe that plaintiff, Rock Island, acted reasonably and in good faith in determining the sum of $20,445.00 as fair and just compensation to Paul Fruit for damages?

"Answer: Yes.

"(5) From all the evidence which has been introduced, what do you find to be amount of damage suffered by Paul Fruit as a result of the accident in question?

"Answer: $20,445.00."

Upon these answers, both parties moved for judgment. The trial court entered judgment for the industry

(R. 29), and the Court of Appeals reversed for a new trial (R. 78).

ARGUMENT

The railroad contended it was entitled to judgment because, inasmuch as the jury found the settlement was reasonable and in good faith, that under the indemnifying contract they had a right to go ahead and settle the claim, when the defendant refused to enter into the negotiations, and that the plaintiff was not required to wait to be sued, risking a judgment much larger in amount than the settlement figure, and that the finding now of non-liability does not affect its right to recover.

The industry asserts that it in no way can be considered liable to the plaintiff, inasmuch as the jury expressly found that both the plaintiff and defendant were free from negligence. Thus, the defendant requests the Court to rule that the plaintiff was a mere volunteer in settling with its employee and to enter judgment for the defendant.

Certainly the situation here does not fall within the statutory definition that "Indemnity is a contract by which one engages to save another from a legal consequence of the conduct of one of the parties, or some other person," because under the answers by the jury to the interrogatories, the industry was guilty of no negligent conduct giving rise to any legal consequence.

This is further fortified by the other statutory provision given above that "Upon an indemnity against lia-

bility, expressly, or in other equivalent terms, the person indemnified is entitled to recover *upon becoming liable.*" But the railroad, the person indemnified here, never became liable.

That the Court of Appeals erroneously construed this statute is illustrated by the holding of the Supreme Court of Oklahoma in *Missouri, K. & T. Ry. Co.* v. *Ellis,* 78 Okla. 150, 189 Pac. 363, wherein it is held in the third syllabus:

> "E. entered into a contract with M. to build for it a depot, to save it harmless from personal injuries caused in any manner by the execution of the contract and made bond to comply therewith. W., a passenger on M.'s train, alighted at night, fell over a piece of timber on depot premises, and was injured. W. sued M., alleging it negligent for leaving the piece of timber on the premises and failing to light up depot premises. E. may be liable if injury was caused by leaving stick in passageway, but not if caused by failure to light up the depot premises. Notice was given of suit to E. and bondsmen, and they requested to defend but failed to do so. A general verdict was returned against M. and the judgment thereon paid. M. then sues E. and his sureties for sum paid W. At the trial E. and sureties objected to any evidence for the reason that the first judgment was conclusive between the parties to this second suit, that is, that both acts of negligence alleged in first suit have been proven, and that the parties hereto were joint tortfeasors and neither could recover against the other. The trial court adopted this theory and entered judgment for E. and his sureties. *Held,* that this was error; that the judgment in the first suit is not conclusive whether or not the leaving of the stick in the passageway or the failure to furnish light was the direct cause of the injury, or whether both contributed thereto."

And on page 365 of the opinion the Court said:

> "Under the above authorities, we believe, and so find, that as a matter of law the judgment in the *Wheeler* case is conclusive between the parties to this suit that the passageway over the depot grounds and over which Wheeler was traveling at the time of his injury was defective, and that he was injured while in the exercise of due care, and that he suffered damages to the amount of the sum paid to him by the railroad; *but that it is not conclusive as to whether the injury was brought about by the negligent acts of the plaintiff or of the defendant, or whether both contributed thereto.*"

And further on page 366 the Court stated:

> "We believe, and so find, that it was the duty of the trial court to hear the evidence of the plaintiff and submit the issue to the jury *whether or not the defendant Ellis was negligent, and whether this act of negligence, if any, by him, was the proximate cause of the injury to Wheeler.* If the railroad company was without fault on its part and compelled to pay damages to Wheeler on account of the negligence of Ellis, then it should recover in this suit."

In our judgment this case holds indemnitee has the burden of proving negligence of the indemnitor before recovery may be had and this is true even though notice has been given and final judgment rendered against indemnitee.

Finally, the conclusion which the industry asserted, upheld by the trial court, is compelled when it is considered that the provision of the indemnity contract relied upon by the railroad states that "* * * and if any claim or liability other than from fire shall arise from the joint or

concurring negligence of both parties, hereto, *it shall be borne by them equally.*" If, as was the situation here, no lawsuit was filed by the injured employee against the railroad, but the railroad settles the employee's claim anyway, if its contention made here were upheld, it would be securing indemnity where there is no liability, and eliminating the above provision that where the parties are equally at fault the loss should be borne equally. This would simply mean that the railroad would have an accident insurance policy on its employees injured on the side tracks, provided it could not be proven that the railroad was undertaking to defraud the industry. Of course this would be practically an impossible situation.

CONCLUSION

The petition for certiorari ought to be granted.

Respectfully submitted,

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